No. 356.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ELEANOR C. HUNTINGTON,
Appellant,

vs.

THE CITY OF NEVADA ET AL.,
Appellees.

Brief of Complainant and Appellant.

RUSSELL J. WILSON,
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Appeal from the Circuit Court of the United States of the Ninth Judicial Circuit, Northern District of California.

Brief of Appellant.

This is an action praying that an injunction be issued enjoining and restraining the City of Nevada and its Board of Trustees, the appellees herein, from proceeding any further in the matter of issuing bonds for the purpose of establishing water works. The demurrer interposed by the respondents to complainant's bill was sustained by the

Court below, and, the complainant declining to amend, her bill was dismissed and final decree entered, and this appeal is from the decree rendered in favor of the respondents and against the complainant and appellant, dismissing her bill. An assignment of errors was duly filed setting out the errors asserted and intended to be urged in support of appellant's appeal, to which assignment we respectfully invite the attention of this Honorable Court.

The facts are fully set forth in the bill of complaint and show that the City of Nevada was duly incorporated by Act of the Legislature of the State of California, passed on the 12th day of March, 1878, and that from that time the City of Nevada became and was a municipal corporation, and still is in existence under and solely by virtue of the provisions of said Act of March 12, 1878, and not otherwise, and that said Act was, and still is, in full force and effect; that in July and September, 1895, its Board of Trustees passed two certain ordinances looking to the creation of an indebtedness of $60,000, for the purchase of water works, although that sum was largely in excess of the amount of indebtedness allowed or permitted to be created by the provisions of the Act of March 12, 1878, under which alone the city had power to act, as claimed by appellant. That, thereafter, further proceedings were had, and in October, 1895,

a special election was held at which more than two-thirds of all the voters voting at said election authorized the issuance of bonds aggregating $60,000 in value. That, thereafter, the said Board of Trustees issued, printed, published and circulated notices calling for bids for the said proposed bonds up to the 12th day of December, 1895, but that this complainant filed her bill in equity on the 10th day of December, 1895, and that from that time thereafter nothing further has been done by the said Board of Trustees in the matter of the sale or disposal of said bonds. That the said Board of Trustees, in taking all the steps set forth looking to the issuance of said bonds assumed to act under and by virtue of certain Acts of the Legislature (fully set forth in the bill and in the 5th assignment of errors), passed after the adoption of the new Constitution of the State of California, which took effect, for some purposes, on July 1, 1879, and for all purposes on January 1, 1880.

It is the contention of appellant that the Act of March 12, 1878, under which the City of Nevada was incorporated, was not in anywise affected by the new Constitution, and that, therefore, the powers of the Board of Trustees were in no degree enlarged or extended by the subsequent Acts of the Legislature (set forth in the 5th assignment of errors), passed in 1889, 1891 and 1893. If this contention be true, then it follows that the Board

of Trustees of the City of Nevada had no authority whatsoever to incur an indebtedness for a sum greater than $2,000, the amount authorized by the Act of March 12, 1878, and that all the acts of the Board looking to the creation of an indebtedness of $60,000 were, and are, null and void *ab initio.*

And it was further shown by the bill that the City of Nevada had never been disincorporated, and had never elected or chosen to reincorporate under the general Municipal Act of 1883, or under the said new Constitution, or to avail itself of any legislation adopted since said new Constitution took effect. It was further shown that the incurring of such an indebtedness as $60,000 was wholly unnecessary and would be a burden upon all tax payers, and would work a great and irreparable injury upon complainant, a tax payer.

The main reliance of complainant and appellant was, and is, the case of Desmond vs. Dunn, 55 Cal., 243, and we respectfully contend that this case is conclusive of the case at bar and that the decree of the Circuit Court should be reversed. We respectfully insist that the criticisms on the case of Desmond vs. Dunn have not overruled it, but have in some instances, explained and modified its effects, though still leaving it the law on this subject in this State, and controlling on this appeal.

As stated by counsel for complainant at the oral argument, the question at once arose when the new Constitution took effect as to what was the status of municipal corporations which had an existence anterior to the adoption of the new Constitution, and in view of the importance of this question it was not singular that the City and County of San Francisco was the first municipality in the State to invoke the consideration and decision of the highest tribunal in the State, which was done in the now well-known case of Desmond vs. Dunn, *supra*.

For the convenience of the Court, we will here insert such parts of that decision as are directly applicable to the question at issue here, and they are as follows:

"The first question which we shall consider is this: If the McClure Charter be constitutional, can it have any force or effect within a municipal corporation which was incorporated prior to the adoption of the Constitution, until a majority of the electors of such corporation vote to accept or organize under it? Section 6 of Art. XI provides that 'Cities and towns heretofore organized or incorporated may become organized under general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities and towns heretofore or hereafter organized, and all

charters thereof framed or adopted by authority of this Constitution, shall be subject to, and controlled by general laws.' Both of these clauses plainly refer to charters which may be framed by authority of the present Constitution, and the latter clause is expressly limited to charters so framed. Neither applies to charters which existed before the adoption of the present Constitution. All such charters must remain in force until superseded or changed in the mode prescribed by the Constitution. In the absence of any positive provision to the contrary, this is necessarily implied. These are the only provisions which are expressly made applicable to cities incorporated previously to the adoption of the Constitution; and the first expressly provides that any of such cities may become organized under general laws whenever a majority of the electors of such city shall so determine; and the other, that any charter framed or adopted under the present Constitution shall be subject to, and controlled by general laws. But charters not framed or adopted by authority of said Constitution, need not be subject to or controlled by general laws. Therefore, the charter of the City and County of San Francisco, which antedates the present Constitution, and was not framed or adopted by authority of it, is not subject to, or controlled by general laws. From which it follows, that if the McClure Charter falls within the term 'general laws,' it cannot have any

force or effect within the City and County of San Francisco, until a majority of the electors thereof so determine, in the manner provided in the Constitution, unless there be some other provision of the Constitution which gives force and effect to said Charter, without such determination of a majority of the electors.

"As these two clauses are the only ones which expressly refer to cities which had charters before and at the time of the adoption of the Constitution, and as many of the other provisions of the Constitution unmistakably refer to charters to be framed or adopted after the adoption of the Constitution, it is clearly our duty, upon well-established principles of construction, to hold that any general provisions which seem to conflict with these special provisions, were intended to apply to charters framed subsequently to the adoption of the Constitution. (Dwarris on Statutes, 765; Cooley's Const. Lim., 63; Commonwealth v. The Council of Montrose, 52 Pa. St., 391; Wise v. Button, 25 Wis., 109).

"To the foregoing views, one objection is raised, which is not wholly devoid of plausibility. It is, that the cities mentioned in section 6 are corporations other than consolidated cities and counties, and that, therefore, the provisions of that section do not apply to the City and County of San Francisco. It seems to us, however, that there is a clause in section 7 which wholly obviates this ob-

jection. It reads as follows: 'The provisions of this Constitution, applicable to cities, and also those applicable to counties, so far as not inconsistent or not prohibited to cities, shall be applicable to such consolidated governments.' The meaning of this plainly is, that all the provisions of the Constitution applicable to cities shall be applicable to consolidated governments; and all the provisions applicable to counties shall also be applicable to such consolidated governments, except such as are inconsistent with the provisions of the Constitution applicable to cities or prohibited to cities; which indubitably makes all the provisions of the Constitution which are applicable to cities likewise applicable to consolidated governments, although provisions applicable to counties may also be applicable to such consolidated governments, if not inconsistent with the provisions of the Constitution applicable to cities, or prohibited by it to them. This strikes us as being such a complete answer to the objection above stated as to render it unnecessary to suggest any other.

"Our first conclusion, therefore, is, that the McClure charter, if constitutional, cannot take effect as the corporation known as the City and County of San Francisco, until a majority of the electors of said corporation, voting at a general election, shall so determine.

"On the argument, it was insisted that the consequence of this would be to leave said city and county without any government after the first of next month. This suggestion would be entitled to some weight if the language of the Constitution on this point were so ambiguous as to leave room for doubt as to the intention of its framers. In the absence of any such doubt, however, our decision upon the proper construction of the Constitution cannot be influenced by what may be the consequences of a proper construction. But there is no ground for any alarm. Impliedly the Constitution provides that cities, incorporated previously to its adoption, shall continue to exist under their existing acts of incorporation, until a majority of the electors determine to be organized under general laws, or frame a charter for their own government. The argument that the existing charter must cease after the first of next month, because it is inconsistent with the clause of section 7 of the Constitution, which provides, that 'in consolidated city and county governments of more than one hundred thousand population there shall be two Boards of Supervisors, or Houses of Legislation,' is based upon what we conceive to be a very narrow view of the provisions of the Constitution; because, if the Constitution has provided, as we think it has, by necessary implication, that the present charter shall remain in force and

effect until superseded or supplanted by one framed and adopted in accordance with the provisions of the Constitution, then no provision of the present charter can be justly said to be inconsistent with any provision of the Constitution. The clause relating to two Boards, or Houses of Legislation, has reference to general laws passed or charters framed for the government of cities, subsequently to the adoption of the Constitution. Otherwise, cities previously incorporated might, by the neglect of the Legislature to pass general laws, or of the people to frame charters for their government, be left without any governments after the first of next month. If the existing governments of cities, or of consolidated cities and counties, expire on the first of July, 1880, the framers of the Constitution could not have overlooked the contingency which might arise, by which such municipalities would be wholly without governments after that date. And if they foresaw it, as they must have foreseen it, if it can arise, they would have provided against it. We certainly could not, upon a clause of doubtful meaning, hold that the Convention intentionally or heedlessly paved the way for the introduction of 'disorganization and chaos;' or that it intended to deprive any municipality of all government, unless such municipality should frame a charter for its own government, or organize under general laws,

which might be obnoxious to a majority of its electors, within an unreasonably short period. 'When the Legislature means to invade previously invested rights, to disregard the public interest, and endanger the peace of the commonwealth, its intention must be expressed in terms free from all ambiguity' (Packer v. S. & E. R. Co., 19 Pa. St., 211).

"The conclusion at which we have arrived is that the Act of incorporation of the City and County of San Francisco, commonly known as 'The Consolidation Act,' is within the first, and not within the last clause of section 1 of the Schedule to the Constitution. And we base this conclusion upon what we conceive to have been the intention of the framers of the Constitution, as we gather it from the language of the instrument itself. To us the general intention to emancipate municipalities, as far as it consistently could be done, from the control of the Legislature, is apparent; and we cannot hold that general laws for the government of such municipalities can take effect in any of them until a majority of the electors so determine, without violating not only the spirit, but likewise the plain letter of the Constitution. The intention being clear, it is our duty to give effect to it."

In Desmond vs. Dunn, Mr. Justice Myrick was exceptionally careful in his separate concurring

opinion, to be found on page 253, to point out industriously the situation, so to speak, and indicate the three courses, either one of which might be pursued by the people of the City and County of San Francisco under the then, and now, existing circumstances: *First*, that the City and County of San Francisco could frame and adopt, subject to ratification by the Legislature, a new charter, and which, if ratified and approved, would supersede any existing charter; *second*, that if the Legislature should pass a general law providing for the incorporation, organization and classification, in proportion to the population, of cities and towns, that the people of San Francisco might determine to become organized under such general law whenever a majority of the electors voting at the general election should express their wish so to do; or, *third*, by non-action, that is, by failing to pursue to the end either of the two courses above indicated, they might retain and act under their present charter, known as the "Consolidation Act," except as to such parts as might be in conflict with the Constitution, viz, method of street improvements, and the like.

The City of Nevada is in no different situation to-day than was the City and County of San Francisco when Desmond vs. Dunn was decided, and as the City and County of San Francisco now is.

No new charter has ever been proposed, adopted or ratified by the people of the City of Nevada, and

it has not become organized under any general law by a vote of a majority of its electors, voting at either a general or a special election, and has seemed to be contented, as was the City and County of San Francisco, with its present charter, limited and restricted as it may be, and without all the authority which possibly it might covet.

The case of Desmond vs. Dunn was the only case in which the central point considered was, were the old charters before the adoption of the new Constitution affected by its adoption and declared void, and in that case it was squarely held, and has, we contend, not since been overruled, that the old charters remained in existence until the particular municipality, such as the City of Nevada, might see fit to either adopt a new charter, or elect by popular vote, to become organized under such general law as the Legislature might thereafter see fit to pass.

A general municipal Act was passed in 1883 by the Legislature of the State of California providing for the incorporation, organization and classification, by population, of cities and counties throughout the State, but it will be seen, by reference to the new Constitution and the Act of 1883 and Acts supplemental thereto and amendatory thereof, that such incorporation, organization and classification could only be effected by a popular vote of the particular municipality seeking to

avail itself of the benefits of the Act, and we insist that until the City of Nevada shall, by popular vote, so determine, that the old charter of 1878 must remain intact, and that the power of the Board of Trustees of that City cannot be enlarged by a general law such as the Act of 1889 and the amendatory Acts thereof.

The attention of this Honorable Court is invited to the provisions of the charter of the City of Nevada, wherein it will be seen that the powers of the Board of Trustees were exceedingly limited, and in many places perhaps inadequate to the growing necessities of the City; but the people of the City of Nevada saw fit, whether wisely or not, to insist upon a limitation of these powers, and these were the conditions, and only conditions, upon which they agreed to become incorporated, subject to the approval and consent of the Legislature of the State of California.

This consent and approval was manifested by the passage of the Act of the Legislature of March, 1878, incorporating the City of Nevada, and this Act has remained upon the statute books unimpaired ever since.

If prior to the adoption of the new Constitution in 1880 the people of the City of Nevada had desired that these powers of the Board of Trustees of the City of Nevada should be increased or enlarged they would have been compelled to have

made application to the Legislature of the State of California for such new and enlarged powers, and which, if granted by the Legislature prior to the adoption of the new Constitution, they could have exercised; but, had the Legislature denied it, they could not have exercised any additional powers, other than those originally set out in the charter of 1878.

It is evident that one of the objects of the new Constitution was to provide for local self-government as far as possible.

This was stated by counsel for complainant on the oral argument, and this thought will be found in one of the decisions of the Supreme Court of the State of California in Thomason vs. Ruggles, 69 Cal., 470, where it is said:

"In arriving at a proper conclusion in this case, we labor under the great difficulty of endeavoring to harmonize apparently conflicting provisions of the Constitution. *One idea seems to be prominent in that instrument, that is, local government for local purposes.*"

The people of the State of California, almost exhausted, it may be said, with local bills and special legislation, passed from time to time at protracted sessions of its Legislature, reluctant always to adjourn, saw fit in 1880 to frame and adopt a new Constitution, declaring that a new order of things should thenceforth prevail, and by most stringent

provisions declared that thereafter no special or local legislation should be had, and limited the sessions of the Legislature, so far as the compensation of its members was concerned, at least, to sixty days, which substantially fixed the life of the Legislature at sixty days, as even the patriotism of its members, without compensation, rarely extended it beyond that period.

Had the people of California, in 1880, seen fit to expressly provide in the new Constitution that all previously existing charters of municipalities should cease after a fixed time, we would not now be before this Honorable Court on behalf of the complainant; but this was omitted from the new Constitution, and, as held in Desmond vs. Dunn, all these charters were expressly continued in existence, at least by the strongest implication, until otherwise changed as provided by law.

The incorporation, organization and classification of cities should first have claimed and received the attention of the Legislature which convened after the adoption of the new Constitution, but this was not effectually done until 1883, by the general Municipal Act, providing for such incorporation, organization and classification.

The unquestioned theory of the new Constitution was that all the municipalities of the State should come in under this general law by popular vote of the respective municipalities and become incorporated under this general law.

No general law providing for such incorporation, organization and classification had been passed when Desmond vs. Dunn was decided, and since the passage of the general law, Desmond vs. Dunn has been several times expressly affirmed and recognized by the Supreme Court of this State, and whenever the Court has had opportunity to recognize the principle of this case it has done so in no equivocal terms.

In the case of The People vs. Pond, 89 Cal., 143, Mr. Justice Paterson, speaking for the Court, said:

"The questions argued by counsel for petitioners are not new. They may not have been presented so forcibly or with as great perspicuity before, but they have been determined adversely to the contentions of the petitioners, after careful consideration of the constitutional and statutory provisions germane to the subject, and we feel constrained to adhere to the construction heretofore adopted. The contention of petitioners, who claim to have been elected as members of the first Board of Supervisors has been settled adversely to them by the decisions in Desmond vs. Dunn, 55 Cal., 248, 249, and People vs. Board of Election Commissioners, 2 West Coast Rep., 366; and the claim of the others, by the decisions in Staude vs. Board of Election Commissioners, 61 Cal., 313; Heinlen vs. Sullivan, 64 Cal., 378, and People vs. Hammond, 66 Cal., 655. The effect which a deci-

sion overruling those cases would have upon municipal proceedings for over ten years past is so apparent, that it is unnecessary for us to point out the reason why we should adhere to the decisions referred to,—at least so far as the Board of Supervisors is concerned,—even though we should believe that they were based upon an erroneous construction of the provisions involved. And although the rule applies with less force to the case of the Police Commissioners, no good reason has been shown why the decisions heretofore rendered should be departed from. If the principle is wrong, or the system works unsatisfactorily, the remedy remains with the people."

This decision of Associate Justice Paterson was concurred in by Associate Justices Harrison, De Haven, Garoutte, McFarland and Mr. Chief Justice Beatty.

The repeated efforts of learned counsel throughout the State to break down and destroy Desmond vs. Dunn have, it will be seen, at least up to the present time, been fruitless, and the Supreme Court of California has, perhaps ingeniously, protected itself each time that the question of the relation of a general law to a particular municipality has been before it, and thus we note in Thomason v. Ruggles, 69 Cal., 471, the following observations of the Court:

"It would be a very difficult matter to determine how far a prior existing charter may remain intact in all its provisions, and yet be 'subject to and controlled by general laws.' To illustrate: Suppose a general law were passed that the presiding officer and executive of every municipality in the State should be called the president of the corporation; would the Mayor of the City and County of San Francisco cease to have that title, and be compelled to take on the title of President of the City and County of San Francisco? or could he, under the existing charter, retain his title of mayor?

"*It is not necessary to attempt to lay down a rule in advance of an existing case. It is sufficient to take the case now before us.*"

The methods by which a municipality, existing under an old charter, can relieve itself from its, perhaps, unhappy state, laid down in the separate concurring opinion of Mr. Justice Myrick in Desmond vs. Dunn, were subsequently adopted by the entire Supreme Court, in a later opinion, in the case of People vs. Hammond, 66 Cal., 656.

This last case was one of several cases in which an effort was made to oust the Board of Police Commissioners of the City and County of San Francisco, and which are alike familiar to the Bench and Bar of California. The Board of Police Commissioners were appointed under an Act of

the Legislature of April 1, 1878, prior to the adoption of the new Constitution, and which was practically an amendment to the Consolidation Act of the City and County of San Francisco, and as such has ever since remained the law of this State, and under which a majority of the commission, originally appointed, have continuously held office for a period of upwards of sixteen years, notwithstanding general laws providing for the police control and power of municipalities, and, every time that the question has been before the Supreme Court of the State of California, it has adhered to its earlier decisions, and practically affirmed the case of Desmond vs. Dunn.

Desmond vs. Dunn was referred to in Barton vs. Kalloch, 56 Cal., 104, and Desmond vs. Dunn was cited with approval by Mr. Justice Thornton.

The question of the relation of a municipality under an old charter was again considered in the case of Wood vs. Board of Election Commissioners, 58 Cal., 562, where the Court says:

"It is as clear as language could make it that the present 'City and County of San Francisco is a continuation of the late municipal corporation known as the 'City of San Francisco.' Under the Consolidation Act and the Acts amendatory thereof, it is nothing more nor less than a municipal corporation, and the question whether a general law affects it or not must be solved by rules

which have been established for determining *when a general law does or does not apply to a municipal corporation.*

"Ordinarily, a general law, when it relates to a matter concerning which no provision is made in the charter of a municipal corporation or any special Act relating exclusively thereto, applies to such corporation the same as to any other political subdivision of the State. But '*it is a principle of very extensive operation that statutes of a general nature do not repeal by implication charters and special acts* passed for the benefit of particular municipalities' (1 Dill. Mun. Corp., Sec. 87).

"Such repeals are not favored. And it has accordingly been held that where the provisions of a city charter and the general law upon the same subject were conflicting and irreconcilable, the provisions of the former were not repealed by the latter (S. S. Bank vs. Davis, 1 McCarter, 286; State vs. Minton, 1 Dutch, 529; State vs. Clark, Id., 54; Walworth Co. vs. Whitewater, 17 Wis., 193; Janesville vs. Markoe, 18 Id., 350; State vs. Branin, 3 Zab., 484). And a clause in the general statute repealing all Acts and parts of Acts in conflict with it, although sufficiently comprehensive to include any repugnant provision of law wherever found, has been held not to repeal provisions of city charters which were repugnant to such gen-

eral law (Walworth Co. vs. Whitewater, Janesville vs. Markoe, and State vs. Branin, *supra*)."

In this case Desmond vs. Dunn was again referred to, but nowhere overruled, and is cited with approval at the top of page 567 in the decision.

In the case of Staude vs. Election Commissioners, 61 Cal., 320, Judge Ross refers to Desmond vs. Dunn, and says:

"If, therefore, the Legislature has, by a general law, provided for the incorporation, organization and classification, in proportion to population, of cities and towns, or, if not, whenever it shall do so, the City and County of San Francisco may become organized under such general law whenever a majority of its electors voting at a general election shall so determine, and shall organize in conformity therewith. And until a majority of such electors do so determine, the Consolidation Act of the city and county cannot be vacated or abrogated by any general act of incorporation," and cites Desmond vs. Dunn, *supra*.

We thus see that Desmond vs. Dunn, decided as early as 55 California, has never been overruled, but stands as the law of the State of California to-day.

If it be claimed that Desmond vs. Dunn, in any of the decisions, has been in any way modified, it could only be claimed that such modification related to *State matters*.

Indeed, this thought is echoed by Mr. Justice Myrick, in the case of Earle vs. Board of Education, 55 Cal., 495, where he says:

"The Consolidation Act may remain for *municipal* purposes—that is, city and county government —yet the educational department, *as a State matter*, be subject, under the Constitution, to general laws passed for that purpose."

We have no doubt that in all matters touching the general taxation policy of the State of California, and in all matters where the interests of the State of California, as a State or Commonwealth, are affected, that general laws may be passed which may supersede certain clauses of existing charters, or charters existing prior to the adoption of the new Constitution, but this does not belong to that class of cases.

The powers of the Trustees of the City of Nevada were fixed by the charter of its incorporation, and no general law could be passed to enlarge those powers, as contended for by the respondents here.

Notwithstanding the abundant opportunities of the Supreme Court to overrule Desmond vs. Dunn in the many cases in which that case has been cited or referred to, the Supreme Court has not seen fit to vacate or set aside this case and, in the State of California at least, it must be accepted as established law, and until the City of Nevada has

seen fit to frame and adopt a new charter, or to elect by popular vote to incorporate under the general Municipal Act, so often referred to in the argument, the powers of its Board of Trustees must remain as we find them, written in its original charter.

For the reasons herein set forth, it is respectfully urged that the decree entered in the Circuit Court should be set aside, and that the demurrer interposed by respondents and appellees should be overruled.

Respectfully submitted,

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Solicitors for Appellant.

P. S.—Since the foregoing brief has been in the hands of the printer, the Supreme Court of California has rendered an elaborate opinion, filed May 20, 1897, in the case entitled P. W. Murphy, Plaintiff and Appellant vs. The City of San Luis Obispo, and others, Defendants, which deals with the whole subject of the issuance of bonds by municipalities, but it is too late to do more than to refer to that case, and to add that, in our judgment, it is determinative of the case at bar in favor of the plaintiff in this action.